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decree dismissing the petition, petitioners bring error. Reversed.

W. D. Cardwell, of Richmond, for plaintiff in error.

The Attorney General, and *J. D. Hank, Jr.*, of Richmond, for defendant in error.

VIRGINIA RY. & POWER CO. *v.* BAILEY.

June 13, 1918.

[96 S. E. 275.]

1. Carriers (§ 318 (10*))—Injuries to Passengers—Evidence.—Where the issue was whether a passenger while stepping from the floor of the car to the running board was thrown to the ground by the stopping of the car, or by a sudden jerk in starting it before the passenger alighted, evidence, when considered in connection with the operation of natural laws, held to require a finding that the injury occurred through the stopping of the car.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 725.]

2. Appeal and Error (§ 995*)—Review—Questions of Fact.—Code 1904, § 3484, providing that, where the evidence is certified, the rule of decision shall be as on a demurrer to the evidence, does not make it compulsory on the appellate court to accept as true what in the nature of things could not have occurred.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 576.]

Error to Hustings Court of Richmond.

Action by Garnett A. Bailey, who sues, etc., against the Virginia Railway & Power Company. In trespass on the case for personal injuries. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

H. W. Anderson, *A. B. Guigon*, and *T. Justin Moore*, all of Richmond, for plaintiff in error.

O'Flaherty & O'Flaherty, of Richmond, for defendant in error.

L. J. UPTON & CO., Inc., *v.* REEVE.

June 13, 1918.

[96 S. E. 277.]

1. Sales (§ 440 (3*))—Merchantability—Evidence.—Whether seller who loaded onion sets on proper cars breached contract providing that sets were to be in good merchantable condition at time of shipment would depend on condition of sets at time of shipment, and evi-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

dence of condition at destination was material only in so far as it showed condition at time of shipment.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 669.]

2. Sales (§ 284 (1, 2)*)—Deterioration—Liability of Seller.—Seller who stipulated that onion sets should be in good merchantable condition at time of shipment would not be liable for negligence of transportation company or natural tendency of sets to decay due to having been grown in a wet season; there being no warranty of keeping quality of sets or that they would germinate.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

3. Sales (§ 445 (4)*)—Evidence—Sufficiency.—Where the evidence left it equally probable that defective condition complained of by defendant buyer was due to other causes for which plaintiff seller was not liable, there could be no verdict for defendant.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 669.]

4. Sales (§ 420*)—Breach—Evidence—Question for Jury.—Whether onion sets had been screened through $\frac{7}{8}$ -inch sieve before shipment by seller as required by contract held, under the evidence, for jury.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 80.]

5. Trial (§ 234 (9)*)—Withdrawing Vital Point at Issue.—There being sufficient evidence to go to the jury on question whether onion sets had been screened through $\frac{7}{8}$ -inch mesh sieve as required by contract of sale, a vital point of issue made by pleadings, giving an instruction which withdrew such question was reversible error.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 732.]

6. Evidence (§ 553 (2)*)—Hypothetical Question—Sufficiency.—Issue being condition of onion sets at time of shipment, a hypothetical question, if a car of onion sets was properly packed in a refrigerated car on the 13th day of a month, and arrived at its destination on the 24th day of said month in the same car in which they were packed, which car was a refrigerated car, and at the time of its arrival the car was cool and in proper condition, ought those onion sets to have been in the same condition as they were at the time they were shipped, was fatally defective in that it failed to include statement of the maintenance of a proper condition of refrigeration and ventilation of the car containing the shipment while it was in transit.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 787.]

Law and Chancery Court of City of Norfolk.

Action by George Reeve against L. J. Upton & Co., Incorporated. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

R. R. Hicks and *John Upton*, both of Norfolk, for plaintiff in error.

Baird & Swink, of Norfolk, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.